No. 89-987

(3)

Supreme Court, U.S.
FILED
JAN 30 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

STANDARD OIL COMPANY OF CALIFORNIA, *et al.*,
Petitioners,

v.

THE CITY OF LONG BEACH and
the STATE OF CALIFORNIA,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITIONERS' REPLY BRIEF

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January 30, 1990

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PETITIONERS' REPLY BRIEF

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1. Respondents' central argument in opposition to the petition is astonishing. Respondents have abandoned as indefensible the rationale of the court of appeals; instead, they baldly state that "[t]his case does not raise the question posed by the petitioners" because, contrary to the express holdings of both courts below, "respondents produced *direct* evidence" of a price-fixing agreement. Resp. Br. i (emphasis in original). Respondents then devote virtually their entire brief to describing what they regard as "direct evidence" of a price-fixing conspiracy.

The short answer to respondents' brief is that both the district court (which reviewed in detail the documents plaintiffs cite) and the court of appeals (which

squarely addressed the question) expressly rejected this exact argument. The district court ruled that "[t]he plaintiffs have no direct evidence of such a [price-fixing] conspiracy. . . ." App. A-29. The court of appeals concluded that "[t]he city has provided no direct evidence that such a conspiracy or conscious parallelism occurred." *Id.* at A-10. However "inartistic" the language of the court of appeals opinion (Resp. Br. 4), there is no ambiguity about its holding that this is a circumstantial-evidence case. Respondents' insistence on arguing this point is therefore mystifying.

A point-by-point refutation of respondents' claims of "direct evidence" is not only inappropriate in this reply, it is unnecessary. As both courts below recognized, and as even a cursory review of respondents' brief in opposition confirms, respondents have no direct evidence of any *agreement* among petitioners to fix or maintain prices.[1] At most, respondents have evidence of parallel pricing and parallel conduct. But it has long been settled, at least until the decision below, that evidence of conscious parallelism is legally insufficient to support an inference of an agreement to conspire. Pet. 26-28. Respondents do not contest that the court of appeals committed this critical legal error, nor do they contest that the court of appeals failed to address whether respondents' hypothesis

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[1] In particular, the court of appeals squarely held that the agreement to define the three cuts of a barrel of crude oil "cannot be flatly classified as a price-fixing arrangement" and therefore is not "unlawful *per se*." App. A-8. The district court directly rejected respondents' assertion that the 1961-62 technical meetings, at which petitioners agreed to revise the definitions of the three cuts, are direct evidence of a conspiracy to fix prices. *See* App. A-44 to A-46 ("There is no indication from the documents or from the depositions or declarations of the participants at the meetings that there was any discussion with respect to posted prices"). Respondents' reliance on *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940), is therefore misplaced, because there plaintiff introduced direct evidence of an agreement to fix prices. *Id.* at 183, 189.

of conspiracy is a more plausible explanation of this conduct than that put forward by petitioners. Where, as here, petitioners have provided independent and legitimate reasons for parallel conduct that are at least as plausible as respondents' hypothesis of conspiracy,[2] petitioners are entitled to summary judgment. At a minimum, in light of *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574 (1986), this issue warrants review by this Court.

The approach taken by respondents is not a proper basis for denying the petition. After 14 years of litigation, the district court concluded that there was insufficient evidence to support a finding that the inference of conspiracy was more probable than the inference of independent action. The court of appeals eschewed that analysis in favor simply of analyzing whether the evidence was sufficient to require a jury trial. If these courts erred in rejecting respondents' direct-evidence theory, this Court should correct that error now.[3] In any

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[2] Specifically, petitioners put forward independent and legitimate reasons for each of the core elements of respondents' circumstantial-evidence case: posting parallel prices (see Pet. 8), engaging in three-cut exchanges (*id.* at 5-6, 10), calculating refining values that were higher than posted prices (*id.* at 4-5; see App. A-47 ("A refiner is not obliged to pay more than market prices for crude oil even though its value to him is greater because of the efficiency of his operation.")). The remainder of the respondents' so-called direct evidence (*e.g.* that regarding "the rigging of prices for Alaska crude" (Resp. Br. i)), was dismissed by the district court as (1) evidence that "tend[ed] to belie, rather than to support, the concept of an agreement" (App. A-44); (2) "speculation bordering on fantasy" (*id.* at A-52); (3) mere "speculations" (*id.* at A-43, A-54); and as the product of a "remarkable imagination" (*id.* at A-56); many of these speculations, in fact, were not even mentioned by the court of appeals.

[3] If there were any merit in respondents' direct-evidence argument, that would simply strengthen the case for granting certiorari. Because the court of appeals rejected respondents' argument that this is a direct-evidence case, respondents are foreclosed from relying

event, the Court should not deny the petition on a ground rejected by both courts below, especially when the consequence of that approach will be to leave the panel's erroneous interpretation of *Matsushita*, its unprecedented application of the doctrine of conscious parallelism and its erroneous substitution of motive for conspiracy as the law of the Ninth Circuit in cases arising under Section 1 of the Sherman Act.

2. Respondents' decision to defend the judgment below on a ground that both courts squarely rejected pointedly confirms that the Ninth Circuit's rationale is indefensible on its own terms. Respondents do not dispute that the court of appeals utterly failed to determine whether plaintiff met its burden under *Matsushita* of introducing circumstantial evidence that made an inference of conspiracy more plausible than an inference of independent action.

Respondents do argue (Resp. Br. 28 n.84) that the conflict in the circuits is limited to vertical dealer-termination cases. The dispositive point is that the standard is the same in vertical and horizontal cases, because in *Matsushita*, this Court expressly adopted as the standard for horizontal conspiracy cases the identical standard that it had earlier adopted in *Monsanto Co.* v. *Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984), a vertical conspiracy case. See Pet. 16-18. In any event, the conflict includes horizontal cases as well. See *Park* v. *El Paso Bd. of Realtors*, 764 F.2d 1053, 1060-61 (5th Cir. 1985), *cert. denied*, 474 U.S. 1102 (1986); *In re Workers' Compensation Ins. Antitrust Litigation*, 867 F.2d 1552 (8th Cir.), *cert. denied*, 109 S.Ct. 3247, 110 S.Ct. 72 (1989).

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on that theory at trial. Since respondents have not cross-petitioned on this point, the point is lost unless the Court grants the petition and allows respondents to raise the issue as an alternative ground for affirming the judgment below.

Furthermore, this is an appropriate case in which to resolve the long-standing confusion over the proper standard for inferring conspiracy in a Section 1 case because the court of appeals committed precisely the same error that the Fourth Circuit has identified other courts as committing: failing to determine whether plaintiff has presented evidence that makes an inference of conspiracy more plausible than that of independent action. See *Parkway Gallery Furniture, Inc.* v. *Kittinger/Pa. House Group*, 878 F.2d 801, 806 & n.4 (4th Cir. 1989). This error requires this Court's review for precisely the same reasons that review was appropriate in *Matsushita*:

> The decision below is one that has significant practical implications for . . . antitrust policy . . . . The immediate result of that error is that this massive, 14-year old case must proceed to trial, although the district court's grant of summary judgment very likely should have been affirmed. . . . In addition, the court of appeals' failure to apply the proper standard in evaluating evidence of conspiracy is likely to discourage district courts from resolving complex antitrust claims on motions for summary judgment in appropriate cases.

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3. Respondents do not even attempt to argue against granting the petition on the second question presented. Their conspicuous attempt to distance themselves from the court of appeals' description and application of "the doctrine of conscious parallelism," which respondents describe as "inartistic," amounts to an implicit concession that the analysis of the court clearly conflicts with this Court's decision in *Theatre Enterprises, Inc.* v. *Paramount Film Distrib. Corp.*, 346 U.S. 537 (1954), and with several decisions of the courts of appeals. Pet. 26-28; see Resp. Br. at 4.

In addition, respondents do not disagree that the court of appeals clearly departed from established antitrust principles in holding that a finding of motive to conspire is a sufficient basis for inferring a conspiracy (see *id.* at 25). Finally, respondents' discussion of motive simply confirms the need for this Court's review. Respondents restate both their theory, untenable after *Matsushita*, that the "long range plans" of petitioners Texaco and Exxon provided them with a plausible motive to accept millions of dollars of certain losses (Resp. Br. 26) and their position that the conspiracy "could never have worked unless all members of the pipeline club followed the rules" (*id.* at 23). In these circumstances, the court of appeals' holding that respondents demonstrated a plausible conspiracy is flatly inconsistent with *Matsushita* and *First Nat'l Bank of Ariz.* v. *Cities Serv. Co.*, 391 U.S. 253 (1968). See Pet. at 25-26.

4. Respondents conclude by asserting that "this case is a melancholy testament to the abuse of pretrial procedures to avoid ever trying a case." Resp. Br. 30. In fact, the pretrial procedures used here were patterned precisely after those employed by Judge Becker in the *Matsushita* case, which this Court expressly approved. See Pet. at 7. The real abuse here lies in the circuit court's cavalier dismissal of the district court's careful review of this record, and in the application of summary judgment and antitrust "doctrines" foreclosed by decisions of this Court.

Respondents achieved their victory in the court of appeals by relying on the same tactic they use in their brief before this Court. Throughout their brief they refer to legitimate business practices and technical aspects of the oil industry with labels such as "secret code" and "Rosetta Stone," and they assert that the individual petitioners are members of a "pipeline club" and are "the majors." No doubt respondents' rhetoric and labels will have an emotional impact on a jury. But, as the district

court understood, "a reasonable jury" after a trial in this case would not "draw an inference of liability that would be 'exercised in the realm of probability, not speculation, surmise and conjecture.'" App. 56-A. Because the court of appeals' decision has paved the way for a jury verdict based on speculation and rhetoric, and because its decision will serve only to discourage district courts from engaging in proper pretrial management and to chill procompetitive conduct, this Court should grant the petition.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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